(8)

ORIGIONAL

NO. 04-721

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Supreme Court, U.S.
FILED
FEB 28 2005
OFFICE OF THE CLERK

ANTHONY LAMARQUE, Warden, Petitioner

V.

REGINALD CHAVIS, Respondent

RESPONSE REQUESTED

RECEIVED
MAR 8 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED FORMA PAUPERIS

IN OPPOSITION OF WRIT OF CERTIORARI PETITION TO THE UNITED STATES SUPREME COURT

Your respondent, Reginald Chavis, asks leave to file the attached "OPPOSITION OF WRIT OF CERTIORARI" to THE UNITED STATE SUPREME COURT without prepayment and costs, and to proceed in forma pauperis, under RULES 12.2 and 39 of the U.S. SUPREME COURT RULES, and 28 U.S.C. §1915(a).

Your respondent has previously been granted leave to proceed in forma pauperis in the following courts:

BEST AVAILABLE COPY

1.) The United States Court of Appeals for THE NINTH CIRCUIT

2.) United States District Court for the Eastern District of California

Your respondents declaration in support of this motion is attached.

February 20, 2005

Respectfully Submitted,

Reginald Chavis

Respondent IN Proper Person

SUPREME COURT OF THE UNITED STATES

ANTHONY LAMARQUE, Warden, Petitioner

V.

REGINALD CHAVIS, Respondent

NO. 04-721

DECLARATION IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Reginald Chavis, am the respondent in the above entitled case. In support of my motion to proceed in forma pauperis, I state that because of my poverty I am unable to pay the costs of this case, or to give security therefor; an I believe I am entitled to redress.

1. For both you and your spouse estimate the amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is amounts before any deductions or taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ Ø	$ N/A	$ Ø	$ NA
Self-employment	$ Ø	$ N/A	$ Ø	$ N/A
Income from real property (such as rental income)	$ Ø	$ N/A	$ Ø	$ N/A
Interests and dividends	$ Ø	$ N/A	$ Ø	$ N/A
Gifts	$ Ø	$ N/A	$ Ø	$ N/A
Alimony	$ Ø	$ N/A	$ Ø	$ N/A
Child support	$ Ø	$ N/A	$ Ø	$ N/A
Retirement (such as social security, pensions, annuities, insurance)	$ Ø	$ N/A	$ Ø	$ N/A
Unemployment payments	$ Ø	$ NA	$ Ø	$ N/A
Public assistance (such as welfare)	$ Ø	$ N/A	$ Ø	$ N/A
Other (specify): _____	$ Ø	$ NA	$ Ø	$ N/A
Total monthly income	$ Ø	$ Ø		

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly Pay
NONE	N/A	N/A	$ Ø
NONE	N/A	N/A	$ Ø
NONE	N/A	N/A	$ Ø

3. List your spouses employment history for the past two years, most recent first. (Gross monthly pay is before taxes or deductions)

Employer	Address	Dates of employment	Gross monthly pay
N/A	N/A	N/A	$ Ø
N/A	N/A	N/A	$ Ø
N/A	N/A	N/A	$ Ø

4. How much cash do you and your spouse have? $ Ø

Below, state any money that you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount you spouse has
NONE	N/A	$ Ø	$ Ø
NONE	N/A	$ Ø	$ Ø
NONE	N/A	$ Ø	$ Ø

5. List the assets, and their values, which you or your spouse owns. Do not list clothing and ordinary household furnishings

☐ Home
Value N/A

☐ Other real estate
Value N/A

☐ Motor Vehicle #1
Year, make & model NONE
Value N/A

☐ Motor Vehicle #2
Year, make & model NONE
Value N/A

☐ Other assets
Description NONE
Value N/A

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
NONE	$ Ø	$ Ø
NONE	$ Ø	$ Ø
NONE	$ Ø	$ Ø

7. State the persons who rely on you or your spouse for support.

Name	Relationship	AGE
NONE	N/A	N/A
NONE	N/A	N/A
NONE	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ Ø	$ Ø N/A
Are real estate taxes included? ☐ yes ☐ no		
Is property insurance included? ☐ yes ☐ no		
Utilities (electricity, heating fuel, water, sewer, and telephone.)	$ Ø	$ N/A
Home maintenece (repairs and upkeep)	$ Ø	$ N/A
Food	$ Ø	$ N/A
Clothing	$ Ø	$ N/A
Laundry and dry cleaning	$ Ø	$ N/A
Medical and dental expenses	$ Ø	$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments.)	$ Ø	$ N/A
Recreation, entertainment, newspapers, magazines, ect.	$ Ø	$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Home owners or renter's	$ Ø	$ N/A
Life	$ Ø	$ N/A
Health	$ Ø	$ N/A
Motor Vehicle	$ Ø	$ N/A
Other: _____	$ Ø	$ N/A
Taxes (not deducted from wages or included in mortgage payments) (specify): _____	$ Ø	$ N/A
Installment payments	$ Ø	$ N/A
Motor Vehicle	$ Ø	$ N/A
Credit Card(s)	$ Ø	$ N/A
Department store(s)	$ Ø	$ N/A
Other: _____	$ Ø	$ N/A
Alimony, maintenece, and support paid to others	$ Ø	$ N/A
Regular expenses for operation of business profession, or farm (attach detailed statement)	$ Ø	$ N/A
Other (specify): _____	$ Ø	$ N/A
Total monthly expenses:		

9. Do you expect any major changes to your monthly income or expenses or in your assets, or liabilities during the next 12 months?

☐ yes ☒ no If yes, describe on an attached sheet

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? yes (no)

If yes, how much? N/A

If yes, state the attorneys name, address, and telephone number:

11. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ yes ☒ NO

If yes, how much? N/A

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case. I have been imprisoned as a ward of the State of California for the past 14 years and I am unmarried and unable to generate any personal income, and my institution of confinement will not cover the cost of litigating this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: February 18, 2005

By: Reginald Chavis
Respondent In Propria Persona

VERIFICATION

(C.C.P. §§ 446, 2015.5; 28 U.S.C. § 1746)

I, Reginald Chavis, declare under penalty of perjury that:

I am the Respondent in the attached matter; I have read the foregoing document(s) and know the contents thereof; that the same is true and correct of my own knowledge, and if called to testify to the contents thereof, I could do so competently as a sworn witness.

Executed this 24th day of February, 2005, at the Salinas Valley State Prison, Soledad, California 93960-1050.

Reginald Chavis
Declarant

.....

DECLARATION OF SERVICE BY MAIL

(C.C.P. §§ 446, 2015.5; 28 U.S.C. § 1746)

I, Reginald Chavis, declare: That I am a resident of Salinas Valley State Prison, Soledad, California; I am over the age of 18 years; that [☒ I am/ ☐ I am not] a party to the above entitled action; that I served a true copy of the document(s) entitled:

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

on the below listed person(s)/party(s) by placing a true copy of said document(s) into a sealed envelope with the appropriate postage affixed thereto, and delivering said envelope to prison staff for mailing by the process provided for at the Salinas Valley State Prison, Soledad, California, addressed as follows:

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
1 FIRST STREET N.E.
WASHINGTON, D.C.
20543-0001

ATTORNEY GENERAL'S OFFICE
C/O CATHERINE CHAKMAN
1300 I STREET
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

I declare under penalty of perjury that the foregoing is true correct of my own knowledge; executed this 24th day of February, 2005, at Salinas Valley State Prison, Soledad, California 93960-1050.

Reginald Chavis
Declarant

ORIGIONAL

NO. 04-721

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY LAMARQUE WARDEN, PETITIONER

V.

REGINALD CHAVIS, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REGINALD CHAVIS, RESPONDENT
IN PROPRIA PERSONA
P.O. Box 1050
SOLEDAD, CALIFORNIA
93960-1050

QUESTION PRESENTED

Did the Ninth Circuit, in this case, erroneously fail to give consideration to the question of whether your respondent, Reginald Chavis, "delayed unreasonably" in State court in between the denial of his State petition for habeas corpus to the Court of Appeal of California (September ###), and his first round petition to the Supreme Court of California (November 16, 1997), after the California Supreme Court gave only a summary denial for it's decision?

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IN THE SUPREME COURT OF THE UNITED STATES

NO. 04-721

ANTHONY LAMARQUE Warden, Petitioner

V.

REGINALD CHAVIS, Respondent

QUESTION PRESENTED

Did the Ninth Circuit, in this case, erroneously fail to determine whether your respondent, Reginald Chavis, delayed unreasonably in between seeking his state petition for habeas corpus to the Court of Appeal of California (September 1999), and his first round petition to the Supreme Court of California (November 16, 1997)" such that it can not be said that [respondent's] application was 'pending'", thereby disentitling him to tolling during that period of time.

ANSWER IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI

Respectfully, your respondent Reginald Chavis, opposes any grant of the petitioner (Warden's), petition for writ of Certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit in this case.

REASON FOR DENYING PETITION

A. PROCEDURAL WAIVER

In the decision below, the Ninth Circuit declined to determine whether a habeas petition filed by your respondent in the California Supreme Court (denied summarily April 28, 1998), was "unreasonably" delayed in it's filing thereby disentitling your respondent to tolling under the AEDPA statute.

Although the Ninth Circuit did, in fact, decline to make such a determination, this was a proper exercise of the court's discretion, in light of the fact that it was not required to make any determination, because your petitioner is procedurally barred from consideration of this question by the court.

Your petitioner failed to forward his "unreasonable delay" contention to the district court jurisdiction. Your respondent, in his reply brief to the Ninth Circuit (at pg.5) timely objected to any such consideration of the question on the basis that he is procedurally barred from consideration.

Therefore, under the circumstances present in this case, the Ninth Circuit did not, as your petitioner contends, disregard this court's instructions, but properly exercised it's own discretion to decline determination of the aggrieved question by your petitioner as he is procedurally barred.

B. STATUTORY REASONS

1 STATUTE INVOLVED

28 U.S.C. § 2244 (d) sets forth the following one-year statute of limitations period, and tolling provision, for an application for a writ of habeas corpus by a state prisoner held in custody pursuant to the judgement of a state court:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgement of a State court. The limitation period shall run the latest of --

(A) the date on which the judgement became final by the conclusion of direct review, or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application, Created by state action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim, or claims, presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction, or other collateral review, with respect to the pertainent judgement or claim is pending, shall not be counted toward any Period of limitation under this subsection.

2 UNDER THE STATUTE THE COURT HAD NO DUTY TO MAKE A FURTHER DETERMINATION

Even if your petitioner had not procedurally defaulted his Claim, the language used in the Anti-Terrorism and Effective Death Penalty Act of 1996 makes it clear that the court below was not duty bound to make any further determination under the circumstances of this particular case.

28 U.S.C. § 2244 (d)(2) states:

The time during which a **properly filed** application for State post conviction, or other collateral review with respect to the Pertainent judgement or claim **is pending shall not be counted toward any period of limitation** under this subsection.

In the decision below (Chavis V. La Marque 382 F.3d 921) [Appendix A] the court properly found 1) that all of your respondent's first round petitions (of which your petitioner disputes) were "properly filed" applications within the meaning of the AEDPA statute and, 2) that a habeas petition is considered pending during one full round of state review, which in California includes petitions filed in the Superior Court, the court of Appeal, and the Supreme Court and 3) that your respondent is entitled to tolling for the **entire first round** of state petitions considered "pending" within the meaning of the AEDPA statute, which he began before AEDPA was enacted.

Your petitioner argues that the court below **must** determine the reasonableness of the three year delay during your

respondent's first round of state petitions looking to state law. He is mistaken. After answering the pre requisite questions of whether your respondent's first round state petitions were both "properly filed," and "pending" within the meaning of the AEDPA Statute, (and favorably to your respondent), the court correctly interprets it has no further duty to make a reasonableness determination. The language used in the statute is instructive. It states: 28 U.S.C. §2244(d)(2)

"The time during which a **properly filed application** for State post-conviction, or other collateral review with respect to the pertainent judgement, or claim, **is pending shall not be counted** toward any period of limitation under this subsection."

Pursuant to this Court's holdings in Carey V. Saffold 536 U.S. 214 the court below concluded; 1) that your respondent's first round petitions were "properly filed" [at footnote 2] "A 'properly filed' petition is one that has been delivered and accepted in compliance with the 'applicable laws and rules governing filings'" Smith V. Duncan 297 F.3d 809, 812 (9th cir 2002) (quoting Dictado V. Ducharme 244 F.3d 724, 726-27 (9th cir 2001). 2) That all of your respondent's petitions were "pending" while they were properly before the California courts for decision (noting: so long as a state Procedure ~~exists~~ for filing the habeas petition exists, the Petition is pending while the state court considers it, whether the decision is ultimately on the merits or on procedural

grounds. See Jenkins V. Johnson 330 F.3d 1146, 1149 (9th Cir 2003) at 1153 (citing Nino V. Galaza 183 F.3d 1003, 1005 (9th cir 1999)).

Consistent with it's conclusions in Saffold V. Newland 1250 F.3d at 1266 (9th cir 2001) the court below defines pending: "we hold that the AEDPA statute of limitations is tolled for 'all of the time during which a state prisoner **is attempting, through proper use of state court procedures**, to exhaust state court remedies with regard to a particular post-conviction application.' Applying these principles to California's post conviction procedure, we hold that the statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge."

A. CAREY V. SAFFOLD AND CALIFORNIA'S COLLATERAL REVIEW SYSTEM

As noted by this court in Carey V. Saffold 122 S. Ct. 2134 "California's collateral review system differs from that of other States in that it does not require, technically speaking, appellate review of a lower court determination. Instead it contemplates that a prisoner will file a new 'original' habeas petition. And it determines the timeliness of each filing according to a 'reasonableness' standard.

The upshot is that California's collateral review process functions very much like that of other States, but for the

fact that it's timeliness rule is indeterminate. Other States (with the exception [***16] of North Carolina, see Allen V. Mitchell 276 F. 3d 183, 186 (CA4 2001) specify time limits such as 30 or 45 days, within which an appeal must be taken, while California applies a general 'reasonableness' standard. Still we do not see how that feature of California's law could make a Critical difference. As mentioned, AEDPA's tolling rule is designed to protect the principles of 'comity, finality, and federalism' by promoting 'the exhaustion of state remedies while respecting the interests in the finality of state court judgements.'" Duncan V. WALKER 533 U.S. at 178 (internal quotation marks omitted)." It modifies the one-year rule (a rule that prevents prisoners from delaying their federal filings) in order to give states the opportunity to complete one full round of review free of federall interference. Inclusion of California's 'reasonableness' periods carries out that purpose in the same way and to the same degree, as does inclusion of the more specific appellate filing Periods prevalent in other states. And exclusion of those Periods in California would undermine AEDPA's statutory goals just as it would in those states."

C. THE NINTH CIRCUIT'S DECISION IS WHOLLY CONSISTENT WITH THIS COURT'S CAREY V. SAFFOLD'S

Your petitioner argues the Ninth Circuit must, in this case, determine whether your respondent "unreasonably delayed" in his state court petition, because the Ninth Circuit has regarded the State Supreme Court's summary denial as a denial on the merits. This must be done, he argues, because, in Saffold, this court remanded in that case, where the California Supreme Court wrote that it denied the petition "on the merits and for lack of diligence", and this court stated: "Given the varaiety of reasons why the California Supreme Court may have included the words 'on the merits' those words by themselves cannot indicate that the petition was timely."

Your petitioner's position misappropriates the differences between the Circumstances present in this case, and those from Saffold. It also misapprehends the court's duties and powers.

In Saffold the California Supreme Cart wrote that it denied Saffolds petition "on the merits and for lack of diligence." In this (your respondent's) case, the California Supreme Court gave a summary denial. In Saffold, where the state court gave some indication of

untimeliness issues entangled in it's denial, such an indication called for the court to exercise it's power to determine, in that case, how that sort of state court denial affected the application of AEDPA's statute of limitations.

In your respondent's case, the court is not required, ie, it is not a mandatory duty that it exercise it's discretion, to make such a determination, because as the court below points out in it's opinion, "When the California Supreme Court denies a habeas petition without comment or citation, we have long treated the denial as a decision on the merits. Hunter V. Aispuro 982 F. 2d 344, 348 (9th Cir 1992). Therefore, the California Supreme Court's denial was on the merits and the petition was not dismissed as untimely. See id., see also Delhomme V. Ramirez 340 F. 3d 817, 819, 820 n. 2 (9th Cir 2003) (noting that there was no indication that a state habeas petition was untimely where the California Supreme Court denied the petition without comment or citation. As a result, Chavis is entitled to tolling during his first round of state Petitions.

Your petitioner's arguments displaces the AEDPA's actual purpose.

"The whole purpose of the AEDPA's requirement is to Permit State courts to address the merits of the petitioner's

claims. As we observed in Nino "tolling the AEDPA's Statute of limitations until the state has fully completed it's review, reinforces comity and respect between our respective judicial systems" Saffold V. Newland 250 F. 3d [redacted] 1262 at 1267 quoting Nino V. Galaza 183 F. 3d 1003 (9th Cir 1999) (noting also "We fail to see why an untimeliness ruling entangled with the federal constitutional merits, which is insufficient to [redacted] cause a default of a federal claim, should be sufficient to defeat tolling of the AEDPA limitation.") (see also at footnote 8: "Such procedural bars to the obtaining of relief do not prevent a petition from being 'properly filed', and review therefore from being [redacted] "available" even if unsuccessful.")

Your petitioner's arguments must fail.

The language set forth in the statute of 28 U.S.C. 2244(d)(2) is instructive. Where your respondent's State application was both "properly filed" and "pending" within the meaning of the statute "The time shall not be counted toward any period of limitation under this subsection. Therefore,

no further determination was required from the court. Though a petitioner's individual circumstances, which define whether his particular application is "properly filed;" and "pending," might vary under California's Collateral review system from other states', this fact does not create a conflict between the circuits so long as the function, and purpose of the statute was justly served in this instance as equally as it is in the other circuits Certiorari should be denied and the petition should be dismissed.

It was pointed out in In re Harris 21 Cal.Rptr. 2d at 379 that "a Petitioner seeking relief on habeas corpus need only file a petition without substantial delay, or if delayed, adequately explain the delay." THIS is the State authority [redacted] on which your petitioner relies on. However, at the time that the State Petition in question by your [redacted] respondent was filed to the Supreme Court of California, in compliance with California's procedures, and in the event that the court were to determine your respondent delayed, your respondent did, in fact, give an explanation within the habeas corpus form's format to the California Supreme Court. See (Appendix B) Yet the California Supreme Court did not, still, write in it's decision that it found your respondent's petition to be "Unreasonably delayed", but gave a summary denial though it clearly had the power to make such a determination; and to give such a ruling if it found it to be appropriate at that time. In light of this evidence that the California Court did give it's consideration to the question, as per California's procedure, and still did not write that your respondent "unreasonably delayed,"

it is conclusive that the court's summary denial was, in fact, a denial on the merits which eliminates a call for a secondary determination by the federal courts.

CONCLUSION

Rule 10 of the Rules of THE SUPREME COURT of the UNITED STATES states: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." No compelling reasons exist in this instance as the court below was not required to make any further determination in this case.

For the reasons set forth above, the petition for writ of certiorari should be denied.

Dated: February 19, 2005

Respectfully Submitted,

Reginald Chavis

Reginald Chavis
Respondent In Propria Persona

APPENDIX-A

Chavis v. Lemarque

382 F.3d 921

4 Cal. Daily Op. Serv. 7936, 2004 Daily Journal D.A.R. 10,703

United States Court of Appeals,
Ninth Circuit.

Reginald CHAVIS, Petitioner-Appellant,
v.
Anthony LEMARQUE, Warden, (FN*) Respondent-Appellee.

No. 01-17072.
Submitted May 10, 2004. (FN**)

Filed Aug. 27, 2004.

Background: Inmate filed petition for writ of habeas corpus. The United States District Court for the Eastern District of California, William B. Shubb, C.J., dismissed petition as untimely, and inmate appealed.

Holdings: The Court of Appeals, Betty B. Fletcher, Circuit Judge, held that:

(1) petitioners's state habeas corpus petitions were pending while petitions were before state courts for decision, and thus, Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition was tolled during this time, and

(2) petitioners's first round of state habeas corpus petitions was pending during three-year interval between decision of Court of Appeal and decision of California Supreme Court, and thus, AEDPA's one-year limitations period for bringing federal habeas corpus petition was tolled during this time.

Reversed and remanded.

West Headnotes

[1] Habeas Corpus ⇐842

197 —
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k842 Review De Novo.

Court of Appeals reviews de novo district court's dismissal on statute of limitations grounds of habeas corpus petition. 28 U.S.C.A. § 2254.

[2] Habeas Corpus ⇐603

197 —
197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

"Properly filed" state habeas corpus petition, within meaning of statute allowing for tolling of Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period while federal habeas corpus petitioner has properly filed

state habeas corpus petitions pending. is petition that has been delivered and accepted in compliance with applicable laws and rules governing filings. 28 U.S.C § 2244(d)(2).

[3] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

Federal habeas corpus petitioners's second round of state habeas corpus petitions was "pending" while petitions were before state courts for decision, and thus, Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition was tolled during this time, even though state petitions were ultimately denied on procedural grounds; state courts' ultimate decision on petitions did not affect whether petitions were pending while courts considered them. 28 U.S.C.A. § 2244(d)(2).

[4] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

Federal habeas corpus petitioners's state habeas corpus petition is "pending" before state court, so as to toll Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition, while state court considers it, so long as state procedure for filing habeas corpus petition exists; whether state court's ultimate decision is on merits or on procedural grounds does not change petition's pending status. 28 U.S.C.A. § 2244(d)(2).

[5] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

Federal habeas corpus petitioners's first round of state habeas corpus petitions was "pending" during three-year interval between decision of Court of Appeal and decision of California Supreme Court, and thus, Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition was tolled during this time, where California Supreme Court summarily denied petition without comment or citation, which is considered to be decision on merits. 28 U.S.C.A. § 2244(d)(2).

[6] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

State habeas corpus petition filed before Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year statute of limitations for bringing federal habeas corpus petition begins to run tolls such limitation period. 28 U.S.C.A. § 2244(d)(2).

[7] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

State habeas corpus petition is considered "pending," so as to toll Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition, during one full round of state review. 28 U.S.C.A. § 2244(d)(2).

[8] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

As long as state habeas corpus petitions are properly filed, federal habeas corpus petitioner is entitled to tolling of Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition during second or subsequent rounds of state review. 28 U.S.C.A. § 2244(d)(2).

[9] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition did not begin to run until day after California Supreme Court's denial of petitioner's first round state habeas corpus petitions became final; such first round state petitions were filed before AEDPA was enacted and AEDPA took effect prior to California Supreme Court's final decision. 28 U.S.C.A. § 2244(d)(2).

[10] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition was not tolled during interval between first and second rounds of state habeas corpus petitions. 28 U.S.C.A. § 2244(d)(2).

[11] Habeas Corpus ⇐603

197 —

197III Jurisdiction, Proceedings, and Relief
197III(A) In General
197k603 Laches or Delay.

Antiterrorism and Effective Death Penalty Act's (AEDPA's) one-year limitations period for bringing federal habeas corpus petition was not tolled when petitioner submitted state habeas corpus petition that was deemed not filed because petitioner did not use proper form. 28 U.S.C.A. § 2244(d)(2).

Reginald Chavis, petitioner/appellant in propria persona.

Bill Lockyer, Attorney General of the State of California, and Catherine Chatman, Deputy Attorney General of the State of California, Sacramento, CA, for respondent/appellee Anthony LeMarque.

Appeal from the United States District Court for the Eastern District of California; William B. Shubb, Chief Judge, Presiding. D.C. No. CV-00-02496-WBS/GGH.

Before: B. FLETCHER, TROTT, and FISHER, Circuit Judges.

BETTY B. FLETCHER, Circuit Judge:

In 1991, Reginald Chavis was convicted of attempted first degree murder with the use of a weapon in Sacramento County Superior Court. He unsuccessfully challenged his conviction on direct appeal in California state courts and then filed two rounds of state habeas petitions. All of Chavis's state petitions were denied, and he filed a federal habeas petition on August 30, 2000. The issue before us is

whether Chavis's federal petition was filed within the one-year statute of limitations provid' ' by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). (FN1) The di: ' court dismissed the petition as untimely. We .erse.

I. Background

The timeliness of Chavis's federal petition depends on whether he is entitled to statutory tolling for each of his state habeas petitions. 28 U.S.C. § 2244(d)(2) (allowing tolling for "properly filed" state habeas petitions while such petitions are "pending"). We therefore set forth in detail the procedural history of his case.

A. Conviction and Direct Appeal

On July 29, 1991, a jury convicted Chavis of attempted murder for the shooting of Katrina Haines. Chavis was sentenced to life with the possibility of parole. Chavis appealed the conviction to the California Court of Appeal and California Supreme Court. Both appeals were denied, the latter on October 28, 1992.

B. First Round of State Habeas Petitions

Chavis filed a habeas petition in Sacramento Superior Court on May 14, 1993, which was denied on the merits on July 30, 1993. Chavis filed a substantially similar petition in the California Court of Appeal on August 22, 1994, and that petition was denied on September 29, 1994.

AEDPA and the one-year statute of limitations for federal habeas petitions took effect on April 24, 1996.

On November 5, 1997, the California Supreme Court received Chavis's habeas petition. The Court denied the petition on April 29, 1998, without any comment or case citation. That decision became final on May 29, 1998.

C. Second Round of State Habeas Petitions

Chavis filed a second habeas petition in Superior Court on December 15, 1998. On January 5, 1999, the Superior Court ordered the petition "not filed" because Chavis, a pro se prisoner, had not filled out the habeas form in accordance with court procedures. On January 25, 1999, Chavis refiled his habeas petition with the Superior Court in the proper format, and it was denied on February 24, 1999. The Superior Court held that the successive petition was barred for "procedural reasons" because it was presented in a "piecemeal" manner. *In re Chavis*, No. 99F00573 at *1 (Sacramento Super. Ct., Feb. 24, 1999) (citing *In re Clark*, 5 Cal.4th 750, 774, 21 Cal.Rptr.2d 509, 855 P.2d 729 (1993)). It

also held that th claims were not presented with "due diligence" because seven years passed between Chavis's conviction and the second petition. *Id.* (citing *In re Robbins*, 18 Cal.4th 770, 780, 77 Cal.Rptr.2d 153, 959 P.2d 311 (1998)).

Chavis filed a second petition in the California Supreme Court on December 17, 1999. That petition was summarily denied with citations to *Clark*, 5 Cal.4th 750, 21 Cal.Rptr.2d 509, 855 P.2d 729, *Robbins*, 18 Cal.4th 770, 77 Cal.Rptr.2d 153, 959 P.2d 311, and *Ex parte Dixon*, 41 Cal.2d 756, 759, 264 P.2d 513 (1953). The denial became final on April 28, 2000.

D. Federal Habeas Petition

Chavis filed his federal habeas petition with the district court on August 30, 2000. The magistrate judge made findings and recommendations that Chavis was not entitled to statutory tolling for state habeas petitions filed prior to the enactment of AEDPA, and that because all subsequent state petitions were filed more than one year after AEDPA's active date, Chavis's federal petition was barred. The district court adopted the findings and recommendations in full on September 18, 2001. Chavis appeals. The state concedes that the district court erred in its reasoning, but argues that Chavis is still not entitled to tolling for any of his state petitions.

II. Analysis

[1] We review de novo the district court's dismissal of Chavis's 28 U.S.C. § 2254 petition on statute of limitations grounds. *See Jenkins v. Johnson*, 330 F.3d 1146, 1149 (9th Cir.2003). We first hold that Chavis is entitled to tolling while his second round of state petitions was pending, even though the petitions were denied on procedural grounds, because the state court's ultimate decision on a particular petition does not affect whether that petition is "pending" *while the court considers it.* Second, we hold that Chavis is entitled to tolling for the three-year interval between his first round petitions to the California Court of Appeal and California Supreme Court--an interval during which AEDPA took effect--because the California Supreme Court did not dismiss the petition as untimely but rather decided it on the merits. Finally, we set forth the proper calculation of the periods for which Chavis is entitled to tolling, and conclude that Chavis's federal habeas petition was timely filed.

A. Definition of Pending

[2] 28 U.S.C. § 2244(d)(2) allows t g of the AEDPA statute of limitations while a eral habeas petitioner has "properly filed" state habeas petitions that are "pending." (FN2)

[3] The state contends that under *Carey v. Saffold*, 536 U.S. 214, 219-21, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002), Chavis's second round petitions were never pending in the state courts, even while the courts had the petitions under submission, because the state courts eventually denied the second round petitions for procedural reasons. The state's argument misapprehends Supreme Court precedent and distorts the plain meaning of the word "pending."

The *Saffold* Court did rely on the state court's decision on whether a habeas petition was untimely to determine whether the state petition was pending, but in a different context: the Court was considering whether the word pending in the habeas statute applied to a time gap between the petitioner's habeas petitions in the California Court of Appeal and the California Supreme Court. *Id.* at 217-18, 122 S.Ct. 2134. This was an issue because in California, petitioners file separate writs at each court level instead of appeals, and California uses a "reasonableness" standard rather than a strict time limit to determine whether the next writ was timely filed after the first was denied. *Id.* at 221-22, 122 S.Ct. 2134.

While *Saffold* clearly applies to determine whether a second round habeas petition was pending *between* levels of review, it is not relevant to whether the second round habeas petitions were pending *while the state courts were considering them.* "The dictionary defines 'pending' ... as 'in continuance' or 'not yet decided.' " *Id.* at 219, 122 S.Ct. 2134 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1669 (1993)). A petition is clearly pending after it is filed with a state court, but before that court grants or denies the petition.

[4] Under the state's strained definition of "pending," a habeas petitioner would not know whether he was entitled to tolling for a petition filed in state court until the court granted or denied his petition. In the meantime, the AEDPA statute would be running and often would expire before the state court decided the case. So long as a state procedure for filing the habeas petition exists, the petition is pending while the state court considers it, whether the decision is ultimately on the merits or on procedural grounds. *See Jenkins*, 330 F.3d at 1153 (citing *Nino v. Galaza*, 183 F.3d 1003, 1005 (9th Cir.1999)). Chavis's second round habeas petitions were pending while they were properly before the California courts for decision. (FN3)

B. Reasonableness of Delay Between First Round Petitions

[5] The state also argues that the three-year delay between Chavis's first round California Court of Appeal and Supreme Court petitions was unreasonable, and therefore cannot be tolled. In contrast to the issue of what is "pending," this is an appropriate situation in which to apply *Carey v. Saffold*, because we must decide whether Chavis had a pending petition during "intervals between a lower court decision and a filing of a new petition in a higher court." *Saffold*, 536 U.S. at 222, 122 S.Ct. 2134. The *Saffold* Court held that a petition is considered pending during such intervals unless the petitioner unreasonably delayed filing a new petition at a higher level. *Id.* at 223, 225, 122 S.Ct. 2134. The Court then remanded for us to decide whether Saffold had unreasonably delayed. *Id.* at 226, 122 S.Ct. 2134. On remand, we held that because the California Supreme Court did not deny Saffold's petition as untimely, but rather on the merits and for lack of diligence in filing his initial petition, the delay in filing the California Supreme Court petition was not unreasonable. *Saffold v. Carey*, 312 F.3d 1031, 1035-36 (9th Cir.2002).

The state argues that we must determine the reasonableness of the three-year delay during Chavis's first round of state

petitions, looking to state law. However, we rejected that approach on remand in *Saffold*, and held that the relevant inquiry is whether the state court denied the petition as untimely. *Id.* at 1034-36.

Under our decision in *Saffold*, because Chavis's November 1997 habeas petition to the California Supreme Court was denied on the merits, it was pending during the interval between the Court of Appeal decision and the Supreme Court petition and he is entitled to tolling. *See id.* When the California Supreme Court denies a habeas petition without comment or citation, we have long treated the denial as a decision on the merits. *Hunter v. Aispuro*, 982 F.2d 344, 348 (9th Cir.1992) (9th Cir.1992). Therefore, the California Supreme Court's summary denial was on the merits, and the petition was not dismissed as untimely. *See id.; see also Delhomme v. Ramirez*, 340 F.3d 817, 819, 820 n. 2 (9th Cir.2003) (noting that there was no indication that a state habeas petition was untimely where the California Supreme Court denied the petition without comment or citation). As a result, Chavis is entitled to tolling during his first round of state petitions. (FN4)

C. Chavis's Federal Habeas Petition Was Timely Filed

[6] We set forth in this section the proper calculation of the time periods for which Chavis was entitled to tolling, when he had properly filed state petitions pending. *See* 28 U.S.C. § 2244(d)(2). The district court dismissed the petition as untimely because it held that Chavis's first state habeas petitions, filed in 1993 and 1994, did not toll the one-year statute, since AEDPA was not enacted until 1996.

The District court erred. (FN5) A "state habeas petition filed *before* the AEDPA statute of limitations begins to run tolls the limitation period." *Jiminez v. Rice*, 276 F.3d 478, (9th Cir.2001) (citing *Tillema v. Long*, 253 F. 494 (9th Cir.2001)).

[7][8] A habeas petition is considered pending during one full round of state review, which in California includes petitions filed in Superior Court, the Court of Appeal, and the Supreme Court. *Nino*, 183 F.3d at 1005-06. As long as the petitions are properly filed, a habeas petitioner is also entitled to tolling during subsequent rounds of state review. *See King v. Roe*, 340 F.3d 821, 823 (9th Cir.2003) (per curiam) (recognizing that a habeas petitioner may be entitled to tolling during a second round of petitions, but holding that the statute is not tolled between rounds); *Dils v. Small*, 260 F.3d 984, 985-86 (9th Cir.2001) (noting that petitioner was entitled to tolling during first, second, and third rounds of state habeas petitions but not between rounds); *see also Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir.1998) ("[I]f a state allows petitioners to file second or subsequent petitions for post-conviction relief, federal courts should not undermine the state's decision by refusing to toll the one-year period of limitation of § 2244(d)(1) where a second or subsequent petition is pending in the state court system.").

[9] Chavis filed a first round of state habeas petitions in the Superior Court in 1993, the Court of Appeal in 1994, and the

California Supreme Court in 1997. Although AEDPA took effect on April 24, 1996, Chavis is entitled to tolling for the entire first round of state petitions, which he began before AEDPA was enacted. Therefore, the one-year statute of limitations under AEDPA did not begin running until the day after California Supreme Court's denial of Chavis's habeas petition became final on May 29, 1998. *See Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir.2002) (noting that the California Rules of Court provide that a California Supreme Court judgment becomes final thirty days after it is issued and holding that the federal statute begins running the day after the state judgment becomes final).

[10][11] The statute was not tolled during the interval between the first and second rounds of Chavis's state petitions. *See Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir.2003). Nor was it tolled when Chavis submitted a petition on December 15, 1998 that was deemed "not filed" because Chavis did not use the proper form. *See Artuz v. Bennett*, 531 U.S. 4, 8, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000) (holding that a state habeas petition is " 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings") (quoting 28 U.S.C. § 2244(d)(2)); *see also Smith*, 297 F.3d at 812. Therefore, Chavis's petition was not tolled between May 29, 1998 and January 25, 1999, a period of 240 days. (FN6)

Tolling recommenced on January 25, 1999, when Chavis properly filed his Superior Court petition and started a second round of state habeas petitions. *See Smith*, 297 F.3d at 812 (holding that petition was "properly filed" even though the state court denied it as procedurally barred because the petition was delivered to and accepted by the state court).

The statute was again tolled during the second round of petitions, from the proper filing in Superior Court on January 25, 1999, until April 28, 2000, the date the California Supreme Court's denial of Chavis's second petition became final. *See id.* Chavis filed a federal habeas petition on August 30, 2000, which was 123 days after the final denial of his last state petition. Chavis's federal petition was close to the deadline, but timely: there are only 363 days that were not tolled, so his petition was filed within the one-year statute of limitations.

III. Conclusion

Chavis is entitled to tolling of the federal statute of limitations for the time during his first and second rounds of state habeas petitions but not between the two rounds. We reverse the district court's dismissal of Chavis's federal petition as untimely and remand for the district court to consider the merits of Chavis's petition.

REVERSED and REMANDED.

(FN*) Anthony LeMarque has replaced Sylvia Garcia as the warden of the Salinas Valley State Prison.

(FN**) This panel unanimously finds this case suitable for decision without oral argument. See Fed. R.App. P. 34(a)(2).

(FN1.) AEDPA's one year statute of limitations applies because Chavis filed his federal habeas petition after AEDPA's effective date, which was April 24, 1996. *See Patterson v. Stewart*, 251 F.3d 1243, 1245 (9th Cir.2001).

(FN2.) A "properly filed" petition is one that has been "delivered and accepted in compliance with 'the applicable laws and rules governing filings.' " *Smith v. Duncan*, 297 F.3d 809, 812 (9th Cir.2002) (quoting *Dictado v. Ducharme*, 244 F.3d 724, 726-27 (9th Cir.2001)). The government only argues that one of Chavis's filings was improperly filed--the November 15, 1998 filing in Sacramento County Superior Court--and we discuss that filing *infra* at section II.C.

(FN3.) The state does not argue that Chavis delayed unreasonably before filing his second round petition with the California Supreme Court after his second round Superior Court petition was denied. He is therefore entitled to tolling during the entire round.

(FN4.) We note, as have other courts, that habeas petitioners should take care to avoid delays between state petitions. "Should the state courts wish (as will usually be the case) to deny such tardily-filed petitions on timeliness grounds, prisoners will find that the door to the federal courthouse is closed as well." *Romero v. Roe*, 130 F.Supp.2d 1148, 1151, (C.D.Cal.2001) ("Romero got lucky. The California Supreme Court denied his ... petition on the merits.").

(FN5.) The state concedes that this holding was error.

(FN6.) The state's brief contains a miscalculation of this period: it states that there are 271 days rather than 240 days between May 29, 1998 and January 25, 1999.

APPENDIX-B

Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See In re Swain (1949) 34 Cal.2d.300,304)

Appointed appellate counsel on direct appeal failed to raise these claims. Petitioner was indigent and a layperson of the law. At the time of commitment petitioner had only a tenth grade education (see probation report ct ___) and was therefore unable to identify these complex errors of State and Constitutional "Law." Petitioner has earned General Education Degree (exhibit 3 attached). By effort, individually, to extend education petitioner identified these claims as a layperson.

Petitioner was also constructively denied access to the courts by the institution to which petitioner is confined. (See exhibit 4 ;attached)

In good faith and in the exercise of sound judgement Petitioner presents these claims to insure the lower court's have been afforded fair opportunity to review these Constitutional claims.

VERIFICATION

(C.C.P. §§ 446, 2015.5; 28 U.S.C. § 1746)

I, Reginald Chavis, declare under penalty of perjury that:

I am the Respondent in the attached matter; I have read the foregoing document(s) and know the contents thereof; that the same is true and correct of my own knowledge, and if called to testify to the contents thereof, I could do so competently as a sworn witness.

Executed this 24th day of February, 2005, at the Salinas Valley State Prison, Soledad, California 93960-1050.

Reginald Chavis
Declarant

.....

DECLARATION OF SERVICE BY MAIL

(C.C.P. §§ 446, 2015.5; 28 U.S.C. § 1746)

I, Reginald Chavis, declare: That I am a resident of Salinas Valley State Prison, Soledad, California; I am over the age of 18 years; that [☒ I am/ ☐ I am not] a party to the above entitled action; that I served a true copy of the document(s) entitled: Respondent's OPPOSITION OF WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

on the below listed person(s)/party(s) by placing a true copy of said document(s) into a sealed envelope with the appropriate postage affixed thereto, and delivering said envelope to prison staff for mailing by the process provided for at the Salinas Valley State Prison, Soledad, California, addressed as follows:

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
1 FIRST STREET N.E.
WASHINGTON, DC
20543 - 0001

ATTORNEY GENERALS OFFICE
C/O CATHERINE CHATMAN
1300 I - STREET
P.O BOX 944255
SACRAMENTO, CA 94244-2550

I declare under penalty of perjury that the foregoing is true correct of my own knowledge; executed this 24th day of February, 2005, at Salinas Valley State Prison, Soledad, California 93960-1050.

Reginald Chavis
Declarant